

## **CENTER ON RACE, POVERTY & THE ENVIRONMENT**

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January 16, 2007

Polly Lowry  
Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive, Suite 200  
Rancho Cordova, CA 95670-6114

**Sent Via Fax: (916) 464-4645 and United States Mail**

cc: Pamela Creedon, Executive Officer  
Karl Longley, Vice Chair  
Paul Betancourt, Board Member  
Christopher Cabaldon, Board Member  
Kate Hart, Board Member  
Sopac Mulholland, Board Member  
Dan Odenweller, Board Member

**Re: Comments on Tentative Waste Discharge Requirements General Order for Existing Milk Cow Dairies**

Dear Ms. Lowry:

The Center on Race, Poverty & the Environment ("CRPE") submits these comments to the Central Valley Regional Water Quality Board ("Regional Board" or "Board") on behalf of itself, Baykeeper and the Sierra Club. The Tentative Waste Discharge Requirement ("WDR") does not comply with the California Environmental Quality Act ("CEQA") (Public Resources Code § 21000 et seq.) and fails to adequately protect drinking water supplies and human health. The WDR

attempts to avoid environmental review by relying on inapplicable CEQA exemptions; fails to implement standards in a timely fashion; and does not ensure that best practicable control technologies are used. The Board should conduct an environmental review of this WDR and revise the WDR to include immediately enforceable standards and best available control technologies.

### **I. The WDR is Subject to Environmental Review Under CEQA**

The Regional Board violated CEQA when it inappropriately exempted the WDR from CEQA instead of engaging in the necessary environmental review. The Regional Board claims the "existing facilities" categorical exemption applies to the WDR, insulating it from environmental review. As a matter of law, however, the categorical exemption for "existing facilities" cannot apply to this project. The Regional Board's decision – which applies a general dairy waste discharge permit for a class of existing dairies – does not fall within the type of project that section 15301 of Title 23, California Code of Regulations ("CEQA Guidelines") exempts. Even if the Regional Board could lawfully exempt the WDR, the cumulative impact and unusual circumstances exceptions to categorical exemptions apply and render the categorical exemption inoperative.

The Board's attempt to avoid CEQA compliance fails in three respects. First, CEQA Guidelines § 15301 by its own terms applies only to the "operation [and] . . . permitting of existing . . . private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." The express terms of § 15301 do not encompass permit *programs* applicable to a broad class of private facilities. The examples of "existing facilities" exempted by § 15301 neither discusses permit program applicability nor analogous situations. See CEQA Guidelines §§ 15301(a)-(p).

Secondly, the term "facilities" in § 15301 does not contemplate a *class* of facilities which would normally have a significant effect on the environment. Dairies, individually and cumulatively, have a significant effect on the environment. Dairies are therefore not within the class of facilities entitled to a categorical exemption under CEQA Guidelines § 15301. See *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192-1193, 1196 (definition of facilities in § 15301 should not extend to a class of businesses that normally would have a significant effect on the environment).

Even if the categorical exemption were applicable here, the Regional Board must still prepare an Environmental Impact Report ("EIR") because the "cumulative impact" and "unusual circumstance" exceptions to the categorical exemptions apply. See CEQA Guidelines §§ 15300.2(b), 15300.2(c). A lead agency cannot use the existing facilities categorical exemption when the cumulative impact of successive projects in the same place, over time, is significant. CEQA Guidelines § 15300.2(b). Nor can the lead agency rely upon the existing facilities exemption when there is a reasonable chance that the activity will have a significant effect due to unusual circumstances. CEQA Guidelines § 15300.2(c). Dairies have a cumulatively significant impact on surface water quality, groundwater quality, and air quality. The Regional Board's own studies and documents show multiple examples of dairy facilities affecting surface and groundwater quality, and

the California Air Resources Board has compiled data showing Concentrated Animal Feeding Operations' significant contribution to the severe smog and particulate matter air pollution problem in the San Joaquin Valley.

Unusual circumstances also demand an EIR. The permit is a regulatory program that covers well over a thousand dischargers. Those projects covered by the existing facilities exemption speak to individual projects unlikely to generate a significant impact. In contrast, the project before the Regional Board is a regulatory program that applies to approximately 1600 facilities. Substantial evidence indicates that those dairies which would qualify for the WDR create an individual and collective risk to water and air quality. The legal standard for determining unusual circumstances is whether "the circumstance of a particular project (1) differ from the general circumstances of the projects covered by a particular categorical exemption; and (2) those circumstances create an environmental risk that does not exist for the general class of exempt projects." *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1209.

Most of the projects contemplated by the existing facilities exemption are small, benign types of activities. CEQA Guidelines §§ 15301(a)-(p). These projects could not conceivably emit the cumulative volume of air and water pollution that dairies emit. Under these circumstances, and given the evidence of groundwater contamination, the types of facilities that qualify for the WDR differ from those projects normally exempt by the existing facilities exemption. For these reasons, the Regional Board cannot utilize the existing facilities exemption.

The WDR cites two other exemptions in its attempt to circumvent CEQA requirements. These exemptions may apply to specific provisions in the WDR, but are not applicable to the permit in general. One, the exemption for the replacement or reconstruction of existing structures, is a similar but more limited exemption than the one for existing facilities. It fails for many of the same reasons as the existing facilities exemption but also has little applicability to the permit in general. The exemption for the minor alterations in the condition of land, water, and/or vegetation is even more limited. These two exemptions do not apply to the monitoring provisions, the implementation of management plans, the best practicable control technologies, or the new discharge prohibitions. In fact, these provisions are applicable only in the event that a dairy poses such a serious environmental hazard that it must rebuild part of the facility or fundamentally change its process. Standing without the existing facilities exemption, these two provisions are too limited in scope to supplant the need for full CEQA environmental review.

For the reasons stated above, the three categorical exemptions cited by the WDR are insufficient to exempt the permit from environmental review. Thus, the Board must immediately commence an environmental analysis of the permit to comply with CEQA.

## **II. The WDR Violates the California Toxics Rule and the Applicable Basin Plans Because it Phases Compliance With Water Quality Objectives**

The WDR implements the requirements of State Water Resources Control Board Resolution 68-16 ("Resolution 68-16"), Title 27 California Code of Regulations for confined animal facilities,

the Central Valley Water Board's Water Quality Control Plan for the Sacramento and San Joaquin River Basins and Tulare Lake Basin. The WDR is legally bound to comply with the water quality objectives and criteria described in these documents, most notably the prohibition of further groundwater degradation and adverse impacts to beneficial uses of groundwater in Resolution 68-16. The WDR is structured to achieve these objectives gradually by phasing in compliance components such as well installation, groundwater monitoring, and elements of the Waste Management Plans ("WMP") and Nutrient Management Plans ("NMP").

The Board received authorization to use phased compliance schedules from the California Toxics Rule ("CTR") which defines a compliance schedule as "an enforceable sequence of interim requirements in a permit leading to ultimate compliance with water quality based effluent limitations . . . in accordance with the CWA."<sup>1</sup> 40 CFR § 131.38. This authorization expired in 2005. 40 CFR 131.38(f). Even if the provision were still valid, the CTR only allows the use of compliance schedules for facilities that were in existence in 2000, and only for a period of five years. 40 CFR § 131.38(e)(2), 40 CFR § 131.38(e)(6).

In addition, the Sacramento and San Joaquin River Basin Plan ("SSJ Basin Plan") and the Tulare Lake Basin Plan ("TL Basin Plan") allow for a phased approach only when the Regional Board "determines it is infeasible to achieve immediate compliance with water quality objectives." SSJ Basin Plan, IV - 16.00; TL Basin Plan IV - 22. The SSJ Basin Plan only allows a phased schedule of compliance in a NPDES permit. SSJ Basin Plan, IV -16.00. Both Basin Plans require that full compliance with any water objective be achieved within ten years of a regulatory adoption.

The phased provisions of the WDR are invalid because the Board no longer has authorization to use compliance schedules; the compliance schedules in the WDR are far longer than the statutory limit; the WDR is not a NPDES permit; and the WDR applies to many facilities built after 2000. The WDR violates the CTR and the Basin Plans and must be rewritten.

#### A. The Monitoring Well Program

The WDR adopts a phased approach to the installation of monitoring wells, requiring only a small fraction of the total number of dairies to install monitoring wells each year. Each year additional dairies will install monitoring wells until all dairies have complied with the WDR. Once the wells are installed, Dischargers use the data to determine their compliance with the WDR. The data collected from monitoring wells can trigger a requirement to reconstruct failing retention ponds. Using the Board's own estimates, total compliance - the installation of monitoring wells at all dairies, the collection of groundwater data, and the reconstruction of faulty retention ponds

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<sup>1</sup>The California Toxics Rule's allowance of a compliance schedule likely is a violation of the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1311(b)(1)(c). Numerous courts have held that neither the EPA nor the states have the authority to extend the deadlines for compliance established by Congress in CWA section 301(b)(1).

(referred to collectively as the "Monitoring Well Program") - will likely take more than 16 years to complete.

In practice, if not in name, these provisions constitute a phased compliance schedule. The CTR no longer authorizes the use of a compliance schedule. In addition, the SSJ Basin Plan allows a compliance schedule only if it is incorporated in a NPDES permit. The WDR is not a NPDES permit. Finally, because full compliance with the WDR may not be achieved until well after ten years, the WDR violates the CTR, the SSJ Basin Plan and the TL Basin Plan.

Both Basin Plans require that "[t]he schedule of compliance shall include a time schedule for completing specific actions that demonstrate reasonable progress toward the attainment of the objectives or criteria and shall contain a final compliance date, based on the shortest practicable time . . . required to achieve compliance." The CTR requires that "where a schedule of compliance exceeds one year, interim requirements are to be specified and interim progress reports are to be submitted at least annually to the permit issuing authority, in at least one-year time intervals." 40 CFR 131.38(e)(5).

The WDR does not contain any time schedule, progress reports or interim requirements for completing the Monitoring Well Program. The closest thing to a timeline is the Board's estimate of 100-200 dairies per year which will be required to install monitoring wells. Since the WDR does not provide a concrete deadline for full compliance or the adoption of interim measures, it violates the CTR, the SSJ Basin Plan and the TL Basin Plan.

In addition to violating CTR and the Basin Plans' phasing requirements, the Monitoring Well Program also may violate Board Resolution 68-16, and the Basin Plan water quality objectives by failing to adequately protect groundwater resources. The Monitoring Well Program uses data obtained from existing domestic and irrigation wells to determine the risk a given dairy presents to groundwater. This approach will likely cause the Board to underestimate a dairy's risk of contamination because existing domestic and irrigation supply wells are usually sited in areas least likely to be contaminated, i.e. upgradient of the facility or otherwise protected from contamination. Dairies that have a high potential for groundwater contamination, therefore, may be permitted to continue operations for years without installing monitoring wells.

In addition, this approach taxes an already constrained agency. If staff is required to evaluate each dairy on a case-by-case basis to determine when monitoring wells should be installed, it will have fewer resources available to work on other pressing needs. The process should be streamlined to allow the Board to engage in other important work.

To comply with applicable law, to ensure that groundwater resources are protected, and to ease resource pressures on the Board, the WDR should be revised to require that all dairies install monitoring wells within a short time period.

## B. Nutrient Management Plans and Waste Management Plans

The WDR establishes a 60-month schedule for Dischargers to develop and implement their Waste Management Plans and Nutrient Management Plans. The WDR must comply with the requirements of CTR and both Basin Plans. Because the ability of the Board to use compliance schedules has lapsed, this provision is invalid. The schedule also violates the SSJ Basin Plan because the Order is not a NPDES permit. For this reason, the permit should be revised to require immediate implementation of NMPs and WMPs upon adoption.

## III. Retention Pond Requirements Fail To Use the Best Practicable Control Technology

The WDR's requirements for retention ponds violate Resolution 68-16. Resolution 68-16 mandates that waste discharge requirements for discharges into existing high quality waters will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the State will be maintained. The treatment and control measures for retention ponds listed in the WDR fail to ensure that pollution or nuisance will be eliminated, and fail to maintain the highest water quality consistent with the maximum benefit to the State. The WDR should be revised to require 1) all retention ponds be subject to liner and seepage rate conditions, 2) the use of a more protective baseline seepage rate and 3) the adoption of additional requirements for retention ponds in vulnerable or high-risk areas.

The WDR does not implement any requirements for existing lagoons. Studies have shown that as many as 63% of dairies have caused groundwater contamination, in large part due to contaminant leaching from retention ponds. WDR Information Sheet, 6. A study commissioned by the State Water Quality Board concluded that existing retention pond requirements under Title 27 of the California Code of Regulations for confined animal facilities were ineffective to protect groundwater.<sup>2</sup> Yet, the WDR allows existing retention ponds to continue to be regulated by Title 27 standards. Because retention ponds under Title 27 have failed to meet state water quality criteria and standards and because the WDR allows the retention ponds to continue to operate under the ineffectual old standards, the WDR fails to ensure that pollution and nuisance will be eliminated, a violation of Resolution 68-16.

The WDR adopts a seepage rate of  $1 \times 10^{-6}$  cm/sec for new and reconstructed ponds as its only objective standard for the design and construction of retention ponds. The seepage rate is based on the Natural Resource Conservation Service's 1992 guidelines for retention ponds. NRCS has updated its guidelines with new requirements for at-risk areas. The 2006 NRCS Practice Standard No. 313 requires a synthetic liner where aquifer vulnerability and risk are high, as in many

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<sup>2</sup> Brown, Vence and Associates. 2003. Review of Animal Waste Management Regulations, Task 2 Report: Evaluate Title 27 Effectiveness to Protect Groundwater Quality.

places in the San Joaquin Valley. However, the Board has not incorporated the additional requirements from the 2006 NRCS revision into the WDR.

An increasing number of studies have shown that a seepage rate of  $1 \times 10^{-6}$  cm/sec is not protective of groundwater. The studies include:

- ◆ Brown, Vence, and Associates. 2003. Review of Animal Waste Management Regulations, Task 2 Report: Evaluate Title 27 Effectiveness to Protect Groundwater Quality, (finding that the NRCS Standards may not be sufficient for all geologic environments.)
- ◆ North Carolina Department of Environment and Natural Resources. 1998. Impact of Animal Waste Lagoons on Ground Water Quality, (finding that lagoons constructed to NRCS standards in either moderately vulnerable or vulnerable sites showed evidence of groundwater contamination.)
- ◆ Lee, G. Fred and Anne Jones-Lee. 2006. Draft Copy - Groundwater Quality Protection Issues, (explains that a simple calculation reveals one foot of  $10^{-6}$  cm/sec compacted clay under one foot of leachate head can be penetrated within a few months.)
- ◆ Arnold, Stephen D. and Edward A. Meister. 1999. Dairy Feedlot Contributions to Groundwater Contamination, A Preliminary Study in New Mexico, (finding that clay linings were less effective than synthetic liners for reducing groundwater contamination.)

In addition, many jurisdictions have adopted criteria more stringent than the  $1 \times 10^{-6}$  cm/sec proposed here. Delaware, Illinois, Louisiana, New Mexico, Oklahoma, Oregon, Virginia, and Wisconsin have state-wide standards that are 10 times more protective of groundwater than those proposed in the WDR. Solano County's ordinance goes much farther, requiring all settling basins and retention ponds to be comprised of a 2-foot thick compacted clay layer with a permeability less than or equal to  $1 \times 10^{-7}$  cm/sec, a 60 mil high-density polyethylene geomembrane with a permeability less than or equal to  $1 \times 10^{-13}$  cm/sec, a geomembrane filter fabric, and a 24-inch thick soil operations layer. The fact that Solano County adopted this standard for Confined Animal Facilities facially demonstrates the technological feasibility and sound basis for a more protective standard. Thus, the WDR is objectively not the best practicable control technology.

The WDR acknowledges that the "seepage rate criterion alone does not assure that a condition of pollution or nuisance will not occur and the highest water quality consistent with the maximum benefit to the people of the State be maintained." It then lists other factors that should be considered including: depth to groundwater, water quality beneath the facility, nature of the material between the bottom of the retention pond and the first encountered groundwater, nature of the leachate from the retention pond, and facility wastewater management practices. The Board then delegates its responsibility to evaluate these factors and set criteria for protecting groundwater to the

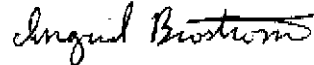
dischargers. This is inappropriate. It is the Board's responsibility to set enforceable standards, not the responsibility of the regulated community. The WDR should delineate additional standards for retention ponds in vulnerable areas using the criteria it has already identified.

Because the WDR does not apply its standards to existing retention ponds, uses a less than fully-protective baseline seepage rate, and does not include additional requirements for ponds in vulnerable areas, the WDR fails to satisfy the requirements of Resolution 68-16 and the Basin Plans. The Board should revise the WDR to ensure that retention ponds do not further contaminate groundwater.

#### IV. Conclusion

For the reasons stated above, the WDR for existing milk cow dairies violates CEQA, Resolution 68-16, CTR, and the Basin Plans and does not adequately protect drinking water supplies or public health. The WDR should be revised and recirculated for public comment. Please include CRPE in future notices about the project. Thank you for the opportunity to comment.

Sincerely,



Ingrid Brostrom

Staff Attorney

Equal Justice Works Fellow